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91-124

Supreme Court, U.S.
FILED
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

RONALD FRANCIS SWOYER,

Petitioner

Versus

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT THE SUPREME COURT OF PENNSYLVANIA ERRED AS A MATTER OF LAW IN UPHOLDING THE TRIAL COURT WHERE THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO FIND A VIOLATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION BY DENYING PETITIONER'S REASONABLE REQUEST FOR CONTINUANCE AND DISMISSING PETITIONER'S APPEAL WITHOUT A HEARING BECAUSE PETITIONER'S ATTORNEY WAS REQUIRED TO APPEAR IN FEDERAL COURT WHEN THE RESPONDENT'S ATTORNEY DID NOT OPPOSE THE CONTINUANCE AN NO PREJUDICE WOULD HAVE RESULTED FROM A CONTINUANCE?

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RONALD FRANCIS SWOYER,

Petitioner

Versus

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Ronald Francis Swoyer, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, Eastern District.

OPINIONS BELOW

The Order of the Pennsylvania Supreme Court rendered May 2, 1991 is unrecorded and appears at page 17 of the Appendix.

The Order of Commonwealth Court of Pennsylvania rendered 11/9/90 is unrecorded and appears at page 19 of the Appendix.

The Order and Opinion of Commonwealth

Court of Pennsylvania rendered 9/10/90 is unrecorded and appears at page 20 of the Appendix.

The Order and Opinion of Lehigh County Court of Common Pleas rendered 10/5/89 is unrecorded and appears at page 35 of the Appendix.

The Final Order of the Supreme Court of Pennsylvania was dated May 2, 1991 and this Petition for Writ of Certiorari was timely filed within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. Section 1254(1) and Rule 17 of this Honorable Court.

FEDERAL PROVISION INVOLVED

The Supremacy Clause, Article VI, Section 2 of the United States Constitution.

STATEMENT OF THE CASE

Petitioner, Ronald Francis Swoyer, appealed to the Court of Common Pleas of Lehigh County, Pennsylvania, concerning the Commonwealth's suspension of Petitioner's driver's license.

On or about December, 1988, Petitioner and Petitioner's attorney appeared in the Pennsylvania Court of Common Pleas for a hearing on Petitioner's appeal. At that time, the court continued the matter so that a transcript could be obtained.

Thereafter, with notice and for good cause, the matter was continued. On January 31, 1989, Petitioner's attorney was unavailable for religious reasons. On March 13, 1989, and August 9, 1989, Petitioner's attorney was in Federal Court.

On October 5, 1989, Petitioner's attorney was required to appear in Federal Court. In his place, Petitioner's attorney sent a former associate of Petitioner's

attorney's firm to request a continuance. At that time, Petitioner's attorney's firm consisted of two attorneys: Mr. Orloski, who was bound to Federal Court; and Mrs. Hinga, an associate who lives in California. Thus, no one from Petitioner's attorney's firm was available to conduct the hearing in the Court of Common Pleas of Lehigh County, Pennsylvania on October 5, 1989.

The Commonwealth's attorney did not oppose a continuance. No prejudice would have resulted to any person from a continuance of this matter. Further, Petitioner's attorney was prepared for the hearing, did not seek additional time and could have appeared at another time in the immediate future. Regardless, the trial court denied Petitioner's request for a continuance, and without a hearing, dismissed the appeal as being without merit.

Petitioner sought review by the Commonwealth Court of Pennsylvania. On September 10, 1990, Commonwealth Court upheld the dismissal of Petitioner's appeal. On November 8, 1990, Commonwealth Court of Pennsylvania denied Petitioner's application for Reargument. On may 2, 1991, the Supreme Court of Pennsylvania denied Petitioner's Petition for Allowance of Appeal. Petitioner respectfully appeals to this Honorable Court.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by Certiorari is appropriate in this case at bar under Rule 17(1)(a) of the Rules of the United States Supreme Court in that a State Supreme Court has rendered a decision in conflict with the United States Constitution so as to call for an exercise of this Honorable Court's power of supervision.

ARGUMENT

I. WHETHER OR NOT THE SUPREME COURT OF PENNSYLVANIA ERRED AS A MATTER OF LAW IN UPHOLDING THE TRIAL COURT WHERE THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO FIND A VIOLATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION BY DENYING PETITIONER'S REASONABLE REQUEST FOR CONTINUANCE AND DISMISSING PETITIONER'S APPEAL WITHOUT A HEARING BECAUSE PETITIONER'S ATTORNEY WAS REQUIRED TO APPEAR IN FEDERAL COURT WHEN THE RESPONDENT'S ATTORNEY DID NOT OPPOSE THE CONTINUANCE AN NO PREJUDICE WOULD HAVE RESULTED FROM A CONTINUANCE?

Generally, refusal of a continuance rests in the discretion of the court to which the application is made. This court's exercise of such discretion will not be reviewed except in clear cases of abuse. Blackman v. Comdex of Pennsylvania State Police, 62 Pa. Comdex 188, 435 A.2d 309 (1981).

1. The trial court clearly abused its discretion in the case at bar.

a) To determine whether a continuance was improperly denied, the court

must consider whether there was prejudice to the opposing party by delay, whether the opposing counsel was willing to continue the case, and length of delay requested. Krueger by Krueger v. Williams, 316 Pa. Super. 408 (1983).

Here, Petitioner appealed to the Court of Common Pleas the Respondent's suspension of Petitioner's driver's license.

In December, 1988, Petitioner and Petitioner's attorney appeared in the Court of Common Pleas for a hearing on Petitioner's appeal. At that time, the court continued the matter so that a transcript could be obtained.

Thereafter, with notice and for good cause, the matter was continued. On January 31, 1989, Petitioner's attorney was unavailable for religious reasons. On March 13, 1989 and August 9, 1989, Petitioner's attorney was in Federal Court.

On October 5, 1989, Petitioner's

attorney was required to appear in Federal Court. In his place, Petitioner's attorney sent a former associate of Petitioner's attorney's firm to request a continuance. At that time, Petitioner's attorney's firm consisted of two attorneys: Mr. Orloski, who was bound to Federal Court; and Mrs. Hinga, an associate, who resides in California. Thus, no one from Petitioner's attorney's firm was available to conduct the hearing in Pennsylvania in the Court of Common Pleas on October 5, 1989.

The Respondent's attorney did not oppose a continuance. No prejudice would have resulted to any person from a continuance of this matter, and Petitioner's attorney was prepared for the hearing and did not seek additional time, but had a conflict. Regardless, the trial court denied Petitioner's request for a continuance, and without a hearing, dismissed the appeal as being without

merit.

b. Petitioner's attorney's scheduling conflict was not so inexcusable that the Petitioner should suffer dismissal of his appeal rather than be granted a continuance. Coburn v. Domanoskye, 257 Pa. Super. 474, 398 A.2d 1335 (1978).

Considering Petitioner's attorney's reasonable explanation, the Commonwealth's lack of opposition, the absence of prejudice and the fact that Petitioner's attorney did not seek additional time, but could have appeared at another time in the immediate future, the Court erred in denying the continuance. Krupa by Krupa v. Williams, supra.

The trial court abused its discretion in refusing to grant a continuance requested by Petitioner to ensure his chosen attorney's availability. Id. Hence, the lower court orders denying the request for

continuance and dismissing Petitioner's appeal ought to be reversed and set aside.

2. The lower court's refusal to continue this matter contravenes the spirit of the Supremacy Clause to the United States Constitution. Generally, trial counsel's conflicting court commitments constitutes justifiable grounds for granting a continuance. Easelli v. Wanamaker, 326 Pa. Super. 290, 473 A.2d 1097 (1984), where, as here, trial counsels' conflicting commitment is in Federal Court, the State court ought to grant the continuance.

In the case at bar, Petitioner's attorney was bound to Federal Court. The Supremacy Clause of Article VI, Section 2, to the United states Constitution provides, inter alia, that Federal laws supersede any inconsistent State laws or rules. Logically, it follows that if an attorney is required to appear in Federal and State court simultaneously, the attorney is bound

to attend the Federal Court matter.

In refusing to grant a continuance based upon a conflicting Federal Court commitment, the trial court violated the spirit of the Supremacy Clause of the United States Constitution. The lower court orders ought to be reversed and set aside. Hence, Petitioner respectfully seeks review by this Honorable Court.

3. The trial court erred as a matter of law in dismissing Petitioner's appeal on the merits without a hearing. Petitioner's counsel respectfully acknowledges the trial court's necessity to insist that cases proceed to adjudication promptly. However, Petitioner's attorney could not avoid the scheduling conflict, as aforesaid.

For the trial court to decide against Petitioner on the merits without a hearing violates Petitioner's constitutional right to due process.

It is physically impossible for one

lawyer to be in two places at the same time. In the private practice of law, scheduling conflicts are unavoidable. There must be a clear priority in scheduling among courts, and the United States Constitution provides the answer to Pennsylvania attorneys in the Supremacy Clause:

> Supreme Court of the United States
> United States Court of Appeals,
> Third Circuit
> United States District Court
> Supreme Court of Pennsylvania
> Superior Court/Commonwealth Court
> Court of Common Pleas

See, Relations of State and Federal Courts, Wright, Miller and Cooper, Federal Practice & Procedure, Jurisdiction Section 4201 et seq. It is an undisputable fact that, even a death penalty imposed by a State court trial judge and affirmed by the highest appellate tribunal in the state can be stricken down by a Federal trial court judge hearing the case on a Federal writ of habeas corpus. In dissent, Judge Pellegrini observes as follows:

> "...Swoyer argues if counsel is required to appear in federal and state courts simultaneously, counsel is bound to attend the federal matter. While I believe that this contention is erroneous so many federal judges believe this to be true, how can it be frivolous?"

With all due respect to Judge Pellegrini, so many Federal judges believe it to be true because they are experts in the United States Constitution, the Supremacy Clause and Federal Court jurisdiction. A Federal trial judge knows that he can dislodge a state court death penalty, even though affirmed by the highest state appellate tribunal. A Federal trial judge knows that he can enjoin a State Governor from implementing a program mandated by the State legislature by finding the program unconstitutional. A Federal trial judge knows that he can enjoin a State trial judge from implementing an order merely by issuing an order enjoining all state personnel from implementing that order.

Given these powers under the Federal Constitution and Federal statutes--and given supremacy over all State officials by virtue of the Supremacy Clause--is there any wonder why so many Federal judges think that their court scheduling order preempts a State court judge's scheduling order.

The reality is that Petitioner, Ronald Swoyer, had his license suspended by a State court judge who never heard all the evidence. When the newly-discovered evidence was found, the appropriate motion was presented to the court to get the issue heard by the court.

In Pennsylvania's Lehigh County, license suspension appeals are only heard, at most, on one day a month, and probably not even that frequently. Given the limited time that Lehigh County trial judges give to license suspension cases, scheduling difficulties are inevitable. When those scheduling conflicts are with

actual Federal court appearances, it would seem obvious and indisputable that a Federal scheduling order takes precedence over the State court order.

There was no prejudice to Respondent, PennDot. Respondent did not even oppose the continuance. The only one who has been prejudiced by the denial of the continuance is the Petitioner because, even though he has newly discovered evidence, he still has not yet had a trial judge address his motion on the merits. Due process of the Fourteenth Amendment (notice and an opportunity to be heard), and the Supremacy Clause require that this appeal not be dismissed because of counsel's unavailability because of an actual appearance in Federal Court. to do so is to exalt from over substance, and to declare that State court judges can strike down Federal Court Orders. The reality in our constitutional system is just the

opposite. See, U.S. v. Composite State Board of Medical Examiners of Georgia, 656 F.2d 131 (Ga Cir, 1981); Ruiz v. Comm. Dept. of Transportation, 679 f.Supp 341, affirmed, 858 F.2d 898 (NY, Cir, 1988). The Orders of September 10, 1990 and November 8, 1990 of the lower court contravene Federal constitutional law, and must be set aside. Hence, Petitioner respectfully seeks review by this Honorable Court.

CONCLUSION

For the foregoing reasons, this Petition For a Writ of Certiorari ought to be granted.

ORLOSKI & HINGA

Richard J. Orloski
Attorney for Petitioner

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

May 6, 1991

Dear Counsel:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

'May 2, 1991 Petition Denied.

Per Curiam.'

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RONALD FRANCES SWOYER, Appellant	:	
	:	NO. 2062 C.D 1989
vs.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Appellee	:	

ORDER

NOW, November 8, 1990, having considered appellant's application for reargument, the application is denied.

BY THE COURT:

David W. Craig
P.J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RONALD FRANCIS SWOYER, Appellant	:	NO. 2062 C.D. 1989
vs.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Appellee	:	

BEFORE: HONORABLE JAMES CRUMLISH, JR., President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE SILVESTRI SILVESTRI, Senior Judge

SUBMITTED ON BRIEFS: March 30, 1990

OPINION NOT REPORTED

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

RONALD FRANCIS SWOYER, Appellant	:	
	:	NO. 2062 C.D. 1989
vs.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION, Appellee	:	

ORDER

AND NOW, this 10th day of September, 1990, the decision of the Court of Common Pleas of Lehigh County denying continuance and dismissing the Motion for Rehearing of Appellant is hereby affirmed, and the case remanded for determination of the amount of counsel fees and costs to be awarded to Appellee, Department of Transportation.

Jurisdiction relinquished.

MEMORANDUM OPINION BY
SENIOR JUDGE SILVESTRI

FILED: Sept. 10, 1990

Ronald Francis Swoyer (Swoyer) appeals from the October 5, 1989 order of the Court of Common Pleas of Lehigh County (trial court) denying his request for a continuance and dismissing his Motion for Rehearing on Grounds of Newly Discovered Evidence (Motion for Rehearing) of his appeal from an order of the Department of Transportation (Department) suspending his operating privileges.

The events giving rise to the present appeal are as follows. Swoyer's operating privileges were suspended by the Department for one year for his refusal to submit to chemical testing pursuant to Section 1547 of the Vehicle Code.[1]

1.Section 1547(b) of the Vehicle Code, 75 Pa. C.S. Section 1547(b), in pertinent part provides:

(b) Suspension for refusal.--

On or about October 7, 1987, Swoyer appealed the order suspending his operating privileges to the trial court. A hearing was held on January 15, 1988 at which the trial court determined that Swoyer had refused to take the breathalyzer and issued an order, on the same date, denying his license suspension appeal. Swoyer never filed an appeal from the January 15, 1988 order of the trial court.

Subsequently, on December 23, 1989, new counsel for Swoyer filed a Motion for Rehearing of his appeal based upon newly discovered evidence. The newly

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...Continued...

> (1) If any person placed under arrest for a violation of Section 3731 (relating to driving under influence of alcohol or controlled substance) is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer, the department shall suspend the operating privilege of the person for a period of 12 months.

discovered evidence involved a discrepancy between testimony of the breathalyzer operator at the license suspension hearing and the criminal trial on drunk driving at which Swoyer was found not guilty. The trial court ordered a hearing on Swoyer's December 23, 1988 Motion for Rehearing based upon this newly discovered evidence. The hearing was scheduled for January 31, 1989.

By order of the trial court dated October 5, 1989, Swoyer's fourth request for a continuance of the hearing was denied and his Motion for Rehearing on his January 15, 1988 appeal was dismissed. [2]

2.On January 23, 1990, the Department filed a motion to quash the within appeal as untimely contending that the dismissal of Swoyer's license suspension appeal by the trial court occurred on January 15, 1988. The Department's motion also included a request for counsel fees.

This Court denied the Department's motion to quash on February 21, 1990 on the basis that this appeal was not from the January 15, 1988 order but from the trial court's October 5, 1989 order which was a

As previously indicated, Swoyer's Motion for Rehearing based upon newly discovered evidence was originally scheduled to be heard by the trial court on January 31, 1989. On January 26, 1989, Swoyer's counsel requested a continuance because of a baptism.[3] The continuance was granted and the hearing rescheduled until March 13, 1989, at which time an additional continuance was requested by Swoyer's counsel because his appearance in federal court was warranted.[4] This continuance was also granted and the hearing rescheduled until April 6, 1989 with the proviso by the trial court "[n]o further continuances to be granted."

...Continued...

final, appealable order. (See Memorandum opinion filed February 21, 1990).

3.Official Record, Item No. 9.

4.Official Record, Item No. 10.

Both the record and paper file are then devoid of any documents or entries indicating what transpired between the scheduled April 6, 1989 hearing and August 9, 1989 when a third continuance was requested by Swoyer's counsel for Swoyer was again made on the basis that he had to appear in federal court.[5] The trial court continued the hearing until October 5, 1989, and again stated: "No further continuances to be granted." On October 5, 1989, another request for continuance was made by an associate of Swoyer's counsel who indicated that counsel was again in federal court.[6]

We are now requested to review the trial court's denial of Swoyer's request for a continuance and dismissal of

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5.Official Record, Item No. 11.

6.No document requesting a continuance on October 5, 1989 appears in the record.

the Motion for Rehearing.[7] Hence, the only issue before us is whether the trial court abused its discretion.

In support of the argument of an alleged abuse of discretion by the trial court, Swoyer contends, that the refusal of the trial court to grant a continuance contravenes the spirit of the Supremacy Clause of Article VI, Section 2, of the United States Constitution which provides, inter alia, that federal law supersedes any inconsistent state rules or laws. U.S. Constitution Art. VI, Section 2. Swoyer argues that as counsel was required to appear in federal and state court simultaneously, counsel was bound to attend the

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7. Our scope of review is limited to a determination of whether the trial court's findings are supported by competent evidence, whether an error of law has been committed, and whether the trial court's decision constitutes a manifest abuse of discretion. Waigand v. Commonwealth, 68 Pa. Commonwealth Ct. 541, 449 A.2d 862 (1982).

federal court matter. We find this argument to be frivolous and lacking in merit.

Similarly, we find Swoyer's argument that counsel's scheduling conflict was not so inexcusable as to warrant dismissal and refusal to grant the continuance, to be without merit.

Pa. R.C.P. No. 216(A)[8] recognizes four grounds for continuance, which are:

> (1) Agreement of all parties or their attorneys, if approved by the Court;
>
> (2) Illness of counsel of record, a material witness, or a party...;
>
> (3) Inability to subpoena ... any material witness...;

8.We are cognizant of the Supreme Court's recent decision in In re Westinghouse Electric Corp., ____ Pa. ___, ___ A.2d ___ (31 and 32 W.D.A.D. 1989, filed May 23, 1990); however, we rely upon Rule 216 as it may assist a trial judge in exercising discretion when presented with a request for continuance.

(4) Such special ground as may be allowed in the discretion of the court.

Request for a continuance based upon counsel's appearance in federal court obviously is encompassed within special ground category number four. Hence, it is discretionary.

That granting of a continuance lies exclusively within the discretion of the trial court is well-established. Chester Housing Authority v. Nicholas, 329 Pa. Superior Ct. 136, 477 A.2d 1391 (1984). Such a determination by the trial court will not be disturbed absent an apparent abuse of discretion. Phoenix Mutual Life Insurance Co. v. Radcliffe on the Delaware, Inc., 439 Pa. 159, 266 A.2d 698 (1970); Walasavage v. Marinelli, 334 Pa. Superior Ct. 396, 483 A.2d 509 (1984).

The record evidences no abuse of discretion by the trial court. In fact, it

reflects the trial court's granting of continuances on a number of occasions in an attempt to accommodate Swoyer's counsel.

Furthermore, Pa. R.C.P. No. 216(B) provides:

> [e]xcept for cause shown in special cases, no reason.. enumerated for the continuance of a case shall be of effect beyond one application made in behalf of one party....

On three separate occasions counsel's excuse for requesting a continuance was his appearance in federal court. Such repeated requests contravene this rule.

Rule 216 is meant to prevent granting of repeated continuances. In this case, three documented continuances were granted; the trial court gave counsel two warnings that "no further continuances" were to be granted; and, hence, was justified in denying the fourth request for a continuance.

We now turn our attention to consideration of the Department's request

for counsel fees. The Department contends that Swoyer's appeal is frivolous and requests an award of counsel fees pursuant to Pa. R.A.P. 2744. A key factor in the determination of whether or not an appeal is frivolous involves a decision as to whether, as a matter of law or fact, appellant's contentions have any likelihood of success or whether continuation of the contest is reasonable. Wenger v. Commonwealth of Pennsylvania, 107 Pa. Commonwealth Ct. 20, 527 A.2d 1071 (1987). Under the circumstances of this case, an award of counsel fees to the Department under Pa. R.A.P. 2744 is warranted. Hence, we remand, on this issue alone, to the trial court for a factual determination of the amount of counsel fees and costs.

As we find no abuse of discretion by the trial court in refusal to grant Swoyer's request for continuance or in dismissal of Swoyer's Motion for Rehearing,

the order of the trial court is affirmed and the case remanded for a determination of the amount of counsel fees and costs to be awarded.

SILVESTRI SILVESTRI, Senior Judge

CONCURRING AND DISSENTING OPINION
BY JUDGE PELLEGRINI
FILED: September 10, 1990

I concur in the affirmance of the trial court's denying continuance and dismissing the motion for a rehearing, but dissent as to the awarding of counsel fees because the appeal is frivolous.

For counsel fees to be awarded on appeal as to whether, as a matter of law or fact, Swoyer's contentions have no likelihood of success and continuation of the contest is unreasonable. Wenger v. Commonwealth of Pennsylvania, 107 Pa. Commonwealth Ct. 20, 527 A.2d 1071 (1987).

Swoyer raises the issue that it was an abuse of discretion for the trial court not to grant a continuance for it contravenes the Supremacy Clause of Article VI, Section 2 of the United States Constitution. On that ground, Swoyer argues that if counsel is required to appear in federal and state courts simultaneously, counsel is

bound to attend the federal court matter. While I believe that this contention is erroneous, so many federal judges believe this to be true, how can it be frivolous?

More to the point, I do not believe that Pa. R.A.P. 2744 authorizes the imposition of counsel fees against a party where the substance of the matter on appeal involves conduct of his counsel rather than that party's interest. Pa. R.A.P. 2744 is not broad enough, and absent a provision in the Appellate Rules similar to that contained in Section 8355 of the Judicial code, 47 Pa. C.S. Section 8355, counsel fees cannot be awarded against the attorney.

For the foregoing reasons, I dissent.

DAN PELLEGRINI, JUDGE

IN THE COURT OF COMMON PLEAS OF LEHIGH, PENNSYLVANIA
CIVIL DIVISION - LAW

COMMONWEALTH OF PENNSYLVANIA, Plaintiff	:	NO. 87-C-2169
vs.	:	
RONALD FRANCIS SWOYER, Defendant	:	

ORDER

AND NOW this _____ day of _____, 1989, upon consideration of the Petitioner's Motion to Reconsider Order of October 5, 1989 Dismissing Appeal, and response thereto, it is hereby Ordered that the Order of October 5, 1989 dismissing the appeal is VACATED and that the Rule to Show Cause heretofore issued is reinstated.

BY THE COURT:

_____ J.

COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	NO. 87-C-2169
vs.	:	
RONALD FRANCIS SWOYER, Appellant	:	

ORDER

AND NOW, this 5th day of October, 1989, it appearing that on January 15, 1989, this Court filed an Order dismissing the appeal as being without merit; and it appearing further that this Court entered an Order for re-hearing on grounds of newly discovered evidence; and it appearing that on January 31, 1989, that Defendant's counsel asked for a continuance because he was attending a baptism; and it appearing further that on March 13, 1989, the Defendant's counsel was given a continuance because he was in Federal Court; and it appearing further that on August 9, 1989,

this Court again granted a continuance on the basis that Defendant's counsel was in Federal court; and it appearing further that on the same date this court directed that no further continuance be granted and that the matter be scheduled for this date, and it appearing further that counsel is again requesting a continuance on the basis of being in Federal Court; the within continuance is denied, the Petition for Re-Hearing is dismissed and the Order entered by this Court on January 15, 1988, is reinstated and the matter is remanded to the Department of Transportation.

In so ruling the Court find that:

(a) The police had reasonable grounds to believe that the Appellant had been operating his vehicle while under the influence of alcoholic beverages;

(b) Appellant was requested to submit to chemical testing as authorized by Section 1547 of the Vehicle Code;

(c) Appellant was informed by the police that his license would be suspended if he refused to submit to chemical testing; and

(d) Appellant did, in fact, refuse to submit to chemical testing.

BY THE COURT:

JOHN E. BACKENSTONE, P.J.